IN THE

Supreme Court of the United States

October Term, 1946. 1947

No. 146

ARTHUR D. SCHULTE, JOHN S. SCHULTE AND DAVID A. SCHULTE, JR., as Trustees under a trust agreement dated June 3, 1932, made by David A. Schulte, as Grantor,

Petitioners,

against

PARK & TILFORD, INC.,

Respondent,

UNITED STATES OF AMERICA,

Intervenor-Respondent,

MARJORIE D. KOGAN, on her own behalf and on behalf of all other stockholders of Park & Tilford, Inc. similarly situated, and in the right of Park & Tilford, Inc.,

Intervenor-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT[1]

Your petitioners, Arthur D. Schulte, John S. Schulte and David A. Schulte, Jr., as Trustees as hereinabove set forth, respectfully pray that a writ of certiorari issue

[1] It is believed that the argument in support of the petitioners' contentions is sufficiently set out in the Reasons Relied on for Granting the Writ, pp. 6-16, *infra*. Accordingly, no separate brief is being filed.

to review the judgment of the Circuit Court of Appeals for the Second Circuit, rendered January 8, 1947, which vacated a judgment of the United States District Court for the Southern District of New York against the petitioners and in favor of the respondent, Park & Tilford, Inc., in the sum of $302,145.81, together with interest and costs, and remanded the action to the District Court for the award of a judgment against your petitioners and in favor of said respondent for $418,128.59, with interest and costs.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered January 8, 1947 (R. 122). Rehearing was denied by order entered March 26, 1947 (R. 148). The jurisdiction of the District Court is founded on the provisions of §27 of the Securities Exchange Act of 1934, 48 Stat. 902, Title 15 U. S. C. §78aa. The jurisdiction of this Court rests upon §240(a) of the Judicial Code as amended by the Act of February 13, 1925 [Title 28, U. S. C. §347a].

Opinions Below

The opinion of the District Court is printed at R. 85. Its Findings and Conclusions appear at R. 78-82.

The opinion of the Circuit Court of Appeals is reported in 160 F. (2d) 984 and is also printed in the record (R. 117). The majority opinion of the Circuit Court of Appeals denying petition for rehearing with respect to the amount of the judgment, and the minority opinion in favor of rehearing, are reported in 160 F. (2d) 989, and are printed in the record at R. 142-7.

Questions Presented

1. Whether a conversion of preferred into common stock, followed by a sale within six months, is a "purchase and sale" within the statutory language of §16(b) of the Securities Exchange Act of 1934, Title 15 U. S. C. §78p(b), where the preferred stock, which had been owned continuously by the petitioners since December, 1937, was made convertible into common stock by the provisions of the certificate of incorporation authorizing the issue thereof, and such conversion into common stock occurred in January, 1944, followed by sales within six months thereafter.

2. Whether such a transaction, even if it be deemed a "purchase" under §16(b), comes within the exception which provides that the section does not apply when "such security was acquired in good faith in connection with a debt previously contracted."

3. Whether §16(b) of the Securities Exchange Act of 1934, if construed to include the transaction at bar, would be valid under the due process and interstate commerce clauses of the United States Constitution.

Statute Involved

Pertinent provisions of the Securities Exchange Act of 1934 (48 Stat. 881, 15 U. S. C. §§78a *et seq.*) are set forth in Appendix A hereto, pp. 17-19, *infra.*

Summary Statement

The petitioners are Trustees under an irrevocable trust agreement dated June 3, 1932, made by their father, David A. Schulte, as grantor. The respondent Park & Tilford, Inc. is a Delaware corporation whose common stock is registered on the New York Stock Exchange. The intervenor Kogan owns 25 shares of the common

stock of Park & Tilford, Inc., which she says she acquired on or about March 10, 1945. The United States of America was permitted to intervene because the petitioners' amended answer put in issue the constitutionality of the statute as sought to be applied to the transaction at bar.

On July 22, 1937 Park & Tilford, Inc. amended its certificate of incorporation and created a class of convertible preferred stock known as "6% Cumulative Preferred Stock" of the par value of $50 per share. This stock was subject to redemption, at $55 per share plus accrued dividends, at the option of the company's board of directors, at any time upon 90 days' notice of such redemption. The holders of such preferred stock had the right to convert each share into 1¼ shares of common stock, and this right of conversion was to continue after notice of redemption but to cease and terminate upon such date as might be fixed for redemption.

In December, 1937 petitioners became the registered owners of 6,604 shares of this preferred stock, which they continuously owned until January 19, 1944.

On November 29, 1943 the board of directors of Park & Tilford, Inc. elected to redeem, on March 20, 1944, all the then outstanding preferred stock at the rate of $55 per share plus accrued and unpaid dividends to the redemption date.

The formal notice of this action was received by the petitioners on or about December 20, 1943. On January 19, 1944 the petitioners elected to convert their preferred into common, and received for such preferred stock 8,255 shares of common stock.[2] The petitioners sold in excess

[2] This course gave the trust the greater of the two available values for its preferred. On March 20, 1944 the redemption price of the preferred, including accrued dividends in full to that date, would have been $55.75 per share. On January 19, 1944, the date on which the petitioners converted their preferred into common, the latter had a market value of $58.25 per share, so that by conversion the petitioners received, for each share of preferred, shares of common having a market value of $72.81 (1¼ times $58.25).

of this number of shares of common, in the administration of the trust, within six months after the date of conversion.

The courts below have held (1) that the petitioners' conversion of their preferred stock into common, and the subsequent sales of common within six months, are a "purchase and sale" within the statutory language of §16(b); (2) that the transaction was not one wherein the common stock "was acquired in good faith in connection with a debt previously contracted"; and (3) that the statute, in its application to such a transaction, is constitutional.

These are the sole questions presented by the instant application.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred as follows:

1. In holding that the petitioners' conversion of the preferred stock into common constituted a "purchase" of the common stock within the meaning of §16(b) of the Securities Exchange Act of 1934.

2. In holding that the acquisition of the common stock by the petitioners, even if it be deemed a "purchase" within §16(b), did not come within the exception which takes out of the application of the section a transaction wherein "such security was acquired in good faith in connection with a debt previously contracted."

3. In holding that §16(b), if construed to include the transaction at bar, is constitutional.

REASONS RELIED ON FOR GRANTING THE WRIT

I

The Court below has decided important questions of Federal law which have not been, but should be, settled by this Court.

The question whether a conversion of preferred stock into common, pursuant to provision therefor in the certificate of incorporation authorizing the issuance of such preferred stock, is a "purchase" within the language of §16(b), has not been passed upon by this Court. Outside the instant case it has never been passed upon by any other court.[3] It is a question of fundamental and widespread importance, governing accountability under §16(b) of the Act in all the situations in which there are outstanding convertible corporate securities.[4]

Nor has this Court, or any other court except in the instant case, ever passed upon the question whether such a transaction as the one in suit, even if it be deemed a "purchase", comes within the exception whereby the provisions of §16(b) do not apply when "such security was acquired in good faith in connection with a debt previously contracted."

Equally important is it, to have authoritatively determined the question whether §16(b), in its application

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[3] *Smolowe* v. *Delendo Corp.*, 136 F. (2d) 231, *cert. den.* 320 U. S. 751, did not involve this question. The transactions in that case were trading transactions of "purchase and sale" within the language of the statute.

[4] "Preferred stocks with the conversion privilege are frequent in the modern financing of corporations, the conditions of their conversion varying widely in different corporations" (Conyngton, Corporation Procedure, Rev. Ed. 1927, p. 374). Moody's Manual of Investments—Industrial Securities, 1946, at pages A83-4, lists 370 publicly held industrial convertible stock issues outstanding as at that time. Included in these issues are convertible preferred stocks of many of the leading companies in the United States.

to such a transaction as the one at bar, is constitutional. The Circuit Court of Appeals disposed of this question by saying merely that it "is entirely without merit; indeed it is foreclosed by *Smolowe* v. *Delendo Corp.*"[5] However, the *Smolowe* case involved no such situation as is here presented.

II

The Court below has decided Federal questions in a way probably in conflict with the applicable law, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. The conversion of preferred stock into common is not a "purchase" within the language of §16(b).

The word "purchase" in ordinary usage does not include a conversion. "Purchase" involves acquisition of an interest not theretofore owned, while "conversion" involves only a change of an existing interest into another form. To use a homely illustration, one may either *purchase* a garage or he may *convert* his barn into one.

It is very artificial to say that either party to the conversion of a convertible security is making a purchase from, or a sale to, the other. We have been able to find no instance, nor has any been cited by the parties, or the courts below, in which legislators or corporate draftsmen have heretofore so characterized either side of this type of transaction. It is commonly recognized in corporate legislation that when a convertible security is authorized, that carries with it, *eo ipso*, authorization for issuance

[5] 160 F. (2d) at p. 988; R. 120.

of the security into which it is convertible.[6] Where stockholders owning convertible preferred stock exercise their conversion privilege, there is no stock transfer tax on the surrender of the preferred stock and no tax liability on the issue of the common stock if the capital of the corporation is not thereby increased.[7] In common parlance, too, and in standard corporate draftsmanship, the words "purchase" and "conversion" are used to denote, respectively, separate types of transactions, differing from each other in the sense which we have indicated. The Securities Exchange Act was devised to regulate the conduct of business men in the securities field, and its language should be construed "as the average business man would read and understand it. He is the one who must bear the burden civilly and criminally."[8]

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[6] The Maryland statute, for example, so declares (Md. Ann. Code, Art. 23, Sec. 45(5)). The New York Stock Corporation Law provides that, in case the authorized capital is not sufficient to meet all conversion requirements, the directors may file a certificate of increase without further action by the stockholders (N. Y. Stock Corp. Law, Sec. 16). Statutory provisions in other states require that the corporation retain in its treasury from the date of issuance of the convertible security a sufficient number of shares of the stock into which it is convertible to meet the possible exercise of the outstanding conversion rights (e. g., Compiled Laws Mich. 1929, Section 10002).

[7] Treasury Department, Special Ruling of Internal Revenue Bureau, July 25, 1941 (CCH Federal Tax Service, 1941, Volume 3, ¶6466, Page 8237).

[8] *Randall* v. *Bailey*, 288 N. Y. 280, 287.

B. The meaning of "purchase" in §16(b) is not enlarged by §3(a)(13) of the statute so as to include the transaction at bar.

The Circuit Court of Appeals recognized that it was doubtful whether the word "purchase" in its normal significance would include a conversion, but reasoned as follows (160 F. (2d), at p. 987; R. 119):

> "Whatever doubt might otherwise exist as to whether a conversion is a 'purchase' is dispelled by definition of 'purchase' to include 'any contract to buy, purchase, or otherwise acquire.' §3(a) (13). Defendants did not own the common stock in question before they exercised their option to convert; they did afterward. Therefore they acquired the stock, within the meaning of the Act."

However, the question is not whether a party has "acquired" the stock, but whether he has acquired it by those means which alone are specified in the statute. If it can be held, as was done by the Circuit Court of Appeals, that the petitioners "acquired the stock, within the meaning of the Act" because they did not own it before conversion but did afterward, then it would be equally logical to hold, in the case of one inheriting stock, or getting it by gift, that he "acquired the stock, within the meaning of the Act" because he did not own it before, but did own it afterward.

§3(a)(13) does not support this result. In so far as §3(a)(13) defines "purchase" to include "any contract to buy, purchase," it does not modify the meaning of the word "purchase" in §16(b), since both sections speak solely, up to this point, of "purchase." Consequently, if §3(a)(13) is to be said to work any enlargement of the meaning of the word "purchase" in §16(b), this can occur only because of the additional words "or otherwise acquire." But these additional words are governed by

the word "contract", and the only "contract to * * * otherwise acquire" in the case at bar was the contract right to convert which went with the preferred stock when the petitioners bought it in 1937. In January, 1944, when the petitioners converted, they did not enter into any "contract to * * * otherwise acquire," but made their acquisition by the exercise of a right which had become theirs back in 1937. The Circuit Court of Appeals, in order to apply §3(a)(13) to the case at bar, read the words "or otherwise acquire" as though the word "contract" were not in the section at all; or, to put it in another way, as though §3(a)(13) defined "purchase" to "include any contract to buy *or* purchase, *or any acquisition however accomplished.*"

Such a construction of §3(a)(13) also violates the Congressional intent in the enactment of the section. It is common ground that, as was argued by the SEC in its brief in the Circuit Court of Appeals, "one of the evils primarily aimed at in this statute was the use of the securities option device to facilitate improper market practices." The SEC, after citing Sen. Rep. No. 1455, 73rd Cong. 2nd Sess., pp. 55-63 as authority for the foregoing statement, continued: "As the House Report emphasized: 'The granting of options to pools and syndicates has been found to be at the bottom of most manipulative operations, because the granting of these options permits large-scale manipulations to be conducted with a minimum of financial risk to the manipulators.' H. Rep. No. 1383, 73rd Cong., 2nd Sess. pp. 10-11."

In the above sense §3(a)(13) serves a salutary purpose, in that it militates against the use of executory contracts (for example, options, puts, calls) as devices to escape the operation of the Act. However, the conversion of a convertible preferred stock has no resemblance to a "securities option device." A different question would arise, coming within §3(a)(13), where a defendant purchased the convertible preferred, exercised his contract

right to convert it into common, and sold the common, all within a period of six months' time. But it is fanciful to speak of transactions involving the bona fide purchase of securities and their retention over a period of years at the normal risk attending any investment, as coming within devices which permit "large-scale manipulations with a minimum of financial risk to the manipulators."

C. It was not the intention of Congress, in enacting §16(b), to include transactions like the one at bar within the operation of the section.

Construing §16(b), the Court said in *Smolowe* v. *Delendo*:[9] "We look first to the background of the statute. Prior to the passage of the Securities Exchange Act, speculation by insiders—directors, officers, and principal stockholders—in the securities of their corporation was a widely condemned evil." It was to correct this evil that §16(b) was enacted.

The same position was taken in this Court by the United States in *Smolowe* v. *Delendo*, when it said, in its Memorandum in opposition to the application for certiorari, that "Section 16(b) creates in any issuer with equity securities registered under the Act, and in its security holders, the right to recover from officers, directors, or 10% stockholders—in short, 'insiders'—any profits which the insiders may make by trading operations in such equity securities within a period of six months."

The "speculation" of which the Circuit Court of Appeals spoke, and the "trading operations" of which the United States spoke, received precise definition in the provision of §16(b) for accountability for profits realized by insiders "from any purchase and sale, or any sale and purchase, of any equity security of such issuer" within six months. The typical case of abuse of inside informa-

[9] 136 F. (2d) at p. 235; see also footnote 1 at that page.

tion, which §16(b) was devised to reach, was the taking of a long or short position in the security of his company by an officer or director, upon learning from inside sources of some favorable or unfavorable development before the general public could learn about it. The officer or director thereupon bought or sold stock of the corporation, as the case might be, and then covered the transaction when the market reacted to the news of which he had had advance information. If he went long on the stock because the news was favorable, he made the "purchase and sale" of which §16(b) speaks. If he went short of the stock because he had learned of an unfavorable development, he made the "sale and purchase" of which the section speaks. In either case the insider took two steps which, together, comprised the "speculation" or "trading operations" at which the statute was aimed: he first took a position in the company's stock, and then withdrew from it. This is the swing which the statute was intended to reach. It begins when the stock is bought, or is sold short, or when a commitment to do either of the foregoing is made, and it terminates when the transaction is closed out by a sale or "covered" by a purchase.

The exercise of the election to convert a security, owned for a long time before by the stockholder, does not come within the evil at which the statute is aimed. The purchase of a convertible stock represents a prudent hedge against changing financial conditions. A preferred stock convertible into common gets its value in large part from the fact that in times of high commodity prices, or inflation, the stockholder can protect himself by exercising his right of conversion. This is not the kind of transaction at which §16(b) was aimed.

D. The petitioners' acquisition of the common stock, even if otherwise within the statute, was "in good faith in connection with a debt previously contracted," and thus is specifically exempted from the operation of §16(b).

The purchaser of shares of convertible preferred stock obtains, by virtue of the provisions of the certificate of incorporation pursuant to which such stock is authorized and issued, in addition to a stock interest, a contract right to receive the common stock into which his preferred shares are convertible; and breach of this right is compensable in damages.[10] The existence of this contract right was expressly found in the case at bar.[11]

In *Pierce* v. *United States*[12] the court said: "In a broad sense a debt may signify any duty to respond to another in money, labor, or service."

This Court spoke in the same sense in *Miller* v. *Robertson*, as follows:[13]

> "The meaning of the word 'debt,' as used in many statutes, is not restricted to demands enforceable in actions of debt. Lord Coke, referring to the Statute of Merton (A. D. 1235), said (Institutes, vol. 2, page 89): 'Debitum signifieth not only debt, for which an action of debt doth lie, but here in this ancient act of Parliament, it signifieth generally any duty to be yielded or paid * * *' ".

In the above case this Court cited, with approval, *New Jersey Insurance Co.* v. *Meeker*, 37 N. J. L. 282, 301, where the court defined "debt" as a word "of large import, including not only debts of record and judgment, and debts by specialty, but also obligations arising on an

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[10] *Cheatham* v. *Wheeling and L. E. R. Co.*, 37 F. (2d) 593.

[11] Finding V, R. 79.

[12] 257 Fed. 514, 516, C. C. A. 8th, 1919; aff'd 255 U. S. 398.

[13] 266 U. S. 243, 249.

implied contract to a very wide extent, and in its popular sense includes all that is due to a man in any form of obligation or promise."

There is a wealth of judicial approval for the following:

> "In common parlance the word 'debt' is sometimes used to denote any kind of a just demand, and has been differently defined owing to the subject matter of the statutes in which it has been used; and while ordinarily it imports a sum of money arising upon a contract express or implied, in its most general sense it means that which one person is bound to pay or perform to another."[14]

In the case at bar the Circuit Court of Appeals said that the statutory exception "is clearly inapplicable to anything except transactions in connection with actual debts."[15]. The obligation of the respondent to issue 1¼ shares of common stock upon conversion of each share of preferred stock, at the election of the preferred stock-

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[14] Am. & Eng. Enc. of Law (2d Ed.) 983. In *Proctor-Gamble Co.* v. *Warren Cotton Oil Co.,* 180 Fed. 543, 546, the court approved the foregoing definition, as well as the following definition from the Standard Dictionary: "The obligation resting upon one person to pay or perform something that is due to another; the state or condition of being indebted to another." In *Gilman* v. *Commissioner,* 53 F. (2d) 47, 50, the court quotes with approval the definition in Webster's New International Dictionary that a debt is "that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or perform for his benefit." In *Latimer* v. *Veader,* 20 N. Y. App. Div. 418, 426, the court quotes with approval the definition of the word "debt" in the Imperial Dictionary as "that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to or perform for another; that which one is obliged to do or suffer." In the last-mentioned case, the court points out further that "there are many cases in which this broader significance has been applied to the term." *Cf.* also, *Carver* v. *Braintree Manufacturing Company,* 2 Story 432, 448-50.

[15] 160 F. (2d) 987; R. 119.

holder, was as much an "actual debt" as the obligation to pay him the redemption price if he elected the alternative of redemption.

The Circuit Court of Appeals further said: "Ownership of preferred or common stock creates an equity interest, and not a creditor's interest, under these circumstances."[16] This, however, misses the point. The ownership of stock, *per se*, creates only an equitable interest; but when the stock is convertible by the terms of the certificate of incorporation into securities of another class, the right of conversion is a contract right which creates a "debt".

Under the construction given by the Circuit Court of Appeals to the exception in §16(b), the exception could come into operation only when the stock is received in payment or satisfaction of money owing. There is no warrant for such a limitation upon the meaning of "debt".

III

Section 16(b), if construed to include the transaction at bar, would be unconstitutional.

The contract right to convert one class of stock into another is of the essence of the relationship between the holder of the convertible stock and his company, and, commonly, is a major inducement for the purchase of the convertible security. It is no answer to say, as was argued below, that §16(b) does not deprive such a stockholder of his right of conversion, but only of his right to deal freely in the security received thereby. The constitutional mandate is not satisfied by destroying the substance and leaving the shadow.

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[16] 160 F. (2d) at p. 987; R. 119.

In *Smolowe* v. *Delendo Corp.*,[17] the Court held that Congress could constitutionally make insiders accountable for the profits of short swing speculations because there was ample evidence to support the Congressional finding that these transactions were an evil in interstate commerce, and because the remedy was reasonably adapted to the correction of that evil.

Short swing speculations by insiders, the Congress found, have no legitimate place in commerce. The same cannot be said, however, and Congress has never evidenced any intent to say it, of the widespread and highly useful institution of convertible corporate securities. There has been no showing made that either the existence or any known use of these conversion rights is in itself an evil, or contributes to the evils, at which the statute is aimed. There are lacking, in the case at bar, both the need for regulation, and the showing that the regulation imposed has a "real and substantial relation to the objects sought to be obtained."[18]

WHEREFORE, it is respectfully submitted that the writ of certiorari herein prayed should issue.

June, 1947.

ARTHUR D. SCHULTE, JOHN S. SCHULTE and DAVID A. SCHULTE, JR., as Trustees,
Petitioners,

By EDWIN A. FALK,
MURRAY C. BERNAYS,
Counsel for Petitioners.

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[17] 136 F. (2d) at pp. 239-41.

[18] *Nebbia* v. *New York*, 291 U. S. 502; *Biddle Purchasing Company* v. *Federal Trade Commission*, 96 F. (2d) 687, *cert. den.* 305 U. S. 634.

Appendix A

Section 27 of the Securities Exchange Act of 1934 (Title 15, U. S. C., §78aa), reads as follows:

> "The district courts of the United States, the district court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts."

Section 16 of the Securities Exchange Act of 1934 (15 U. S. C., §78p), so far as pertinent, reads as follows:

> "(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered on a national securities exchange, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security or within ten

days after he becomes such beneficial owner, director, or officer, a statement with the exchange (and a duplicate original thereof with the Commission) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been any change in such ownership during such month, shall file with the exchange a statement (and a duplicate original thereof with the Commission) indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

"(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

Section 3(a) subdivision 13 of the Securities Exchange Act of 1934 (section 78c(a), subdivision (13) of Title 15 U. S. C.) reads as follows:

> "The terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire."